IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-968

DETROIT EDISON COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF CITY OF LOS ANGELES AND CITY OF SAN DIEGO AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TOPICAL INDEX

TABLE OF AUTHORITIES

Miscellaneous Authorities

(Other)

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BRIEF OF CITY OF LOS ANGELES AND CITY OF SAN DIEGO AS AMICI CURIAE

This brief of the Cities of Los Angeles and San Diego, California, as Amici Curiae is filed by the City Attorneys of those cities pursuant to Rule 42(4) of the Rules of the Supreme Court.

INTERESTS OF THE AMICI CURIAE

The Cities of Los Angeles and San Diego are municipal corporations within the State of California. The interests of those cities arise from their positions as public sector employers which have charter requirements to hire individuals based upon merit. Pursuant to merit principles, both cities use various personnel tests to hire and to promote individuals in the classified civil service.

Further, both cities have collective bargaining relationships with employee unions, pursuant to California Meyers-Milias-Brown Act. See California Government Code §§ 3500-10 (West 1978 Supp.). Although neither Los Angeles nor San Diego is covered by federal labor law provisions, California courts look to this Court's interpretation of federal law in considering issues under the California statute. See Fire Fighters Union, Local 1186 v. City of Vallejo, 12 C.3d 608, 616-17 (1974).

Specifically, the City of Los Angeles employs approximately 47,000 individuals.

Of those employees, 39,707 are in the classified civil service, and are appointed to approximately 1,496 civil service classifications. Pursuant to the City's Charter, each of those civil service classifications require a merit procedure to select the most qualified applicants among those presenting themselves for consideration. Further, approximately 87 percent of all city employees are in bargaining units represented by a union. The City of Los Angeles maintains "Memoranda of Understanding" pursuant to the applicable California law with approximately 15 such unions, representing about 42 bargaining units. Similarly, the City of San Diego employs approximately 6,800 individuals, in 420 civil service classifications. That city negotiates with 4 public employee unions, representing 8 bargaining units covering 6,184 budgeted positions.

Both Los Angeles and San Diego have been subject to employee discrimination suits brought by the federal government, alleging that various personnel tests

are discriminatory against Black and Spanish-surnamed minorities and women. The most recent such suit in Los Angeles, filed on June 2, 1977, alleges race, sex, and national origin discrimination in the Los Angeles Police Department. That matter has been stayed by the federal court pending the appeal of a sex discrimination suit involving similar issues which had been decided in favor of the City 20 days prior to the filing of the Government's complaint. See Blake v. City of Los Angeles, 435 F.Supp. 55 (C.D. Cal. 1977) (appeal pending). The City of San Diego was the defendant in a similar suit (filed on December 21, 1976) covering all departments except the police department. That dispute was settled by a consent decree executed by the district court on December 17, 1977.

Thus, both cities before this Court as Amici Curiae have interests in maintaining personnel testing programs to fulfill the merit system requirements of their municipal charters, as well as interests in sustaining those personnel tests in litigation. In accord with

those interests, these Amici limit their comments to the need for confidentiality of test materials, and do not address the issues which relate to the disclosure of test scores.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief, the Amici argue that confidentiality of personnel test materials is necessitated by the nature of personnel testing. In the absence of confidentiality, an employer would have no way of knowing whether the test was predicting an applicant's ability (and, assuming a job-related test, that applicant's ultimate job performance), or whether the applicant's performance on the test was merely a function of his or her memory.

Further, the performance of test takers on an examination which has been disclosed would be "unreliable". For example, an applicant who had recently reviewed a disclosed examination would be more likely to do better on the examination immediately after that review than on an administration of that examination several months later. In light of the

impact of the disclosure of test materials on the usefulness of personnel tests, any balancing of interests under federal labor law should result in maintaining the confidentiality of those materials.

The Amici further urge the Court to refrain from basing a holding in favor of the Respondent, Detroit Edison Company (hereinafter, "the Employer"), on an interpretation of guidelines drafted by federal compliance agencies having litigating responsibilities. In the experience of the Amici, such language in opinions by this Court leads to an increasingly technical interpretation of those guidelines by federal compliance agencies and certain lower courts. Such an interpretation, in turn, leads to greater pressure on employers to adopt quota hiring based upon the numerical parity of various groups in the general population. That result, the Amici submit, is not in accord with Title VII of the 1964 Civil Rights Act, as amended.

On the basis of those two arguments, the Amici ask the Court to uphold the

Employer in this action, and to limit its rationale for that decision to the nature of personnel testing. Similarly, the Amici ask that the Court utilize the concept of "job-relatedness", if at all, consistently with the "much more sensible construction of the job-relatedness requirement" interpreted in Washington v. Davis, 426 U.S. 229, 251 (1976). Further, if federal "guidelines" require discussion in the context of this opinion, the Amici suggest that such guidelines be accorded only "consideration". General Electric Co. v. Gilbert, ____ U.S. ____, 97 S.Ct. 401, 411 (1976).

Alternatively, if the Court were to hold against the Employer on the facts of this case, the Amici ask the Court to recognize that such decisions should be made upon a case-by-case basis. Specifically, the fact that personnel tests used by municipalities are necessitated by a need to implement merit principles as an alternative to the once prevalent "spoils" system may call for a different result. Cf. Kirkland v. New York State Bd. of Correctional Services, 520 F.2d 420, 428

(2d Cir. 1975).

ARGUMENT

I

THE CONFIDENTIALITY OF THE EMPLOYER'S TESTS SHOULD BE MAINTAINED DUE TO THE NATURE OF PERSONNEL TESTS AND THE RISK OF HARM TO THE EMPLOYER AS A RESULT OF DISCLOSURE

Established authority mandates that, in determining whether the test materials at issue here should be disclosed, the lower court should have considered the circumstances of the particular case. See NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-54 (1956). It is the position of the Amici that both the lower court and the National Labor Relations Board misunderstood the nature of personnel testing, and that misunderstanding led to an erroneous balancing of interests between the employer and the union.[1/] In the following paragraphs, the

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1/ The Amici submit, without further discussion, that the "restriction" placed upon disclosure of test materials by the union provides inadequate protection for test confidentiality. See Case Comment, "Psychological Aptitude Tests and the Duty to Supply Information: NLRB v. Detroit Edison Co.", 91 Harv. L.R. 869, 875-77 (Feb. 1978).

Amici discuss the nature of personnel testing as it applies to the instant dispute.

A. The Nature of Personnel Testing Requires Test Confidentiality.

Generally speaking, "a test is a systematic procedure for comparing the behavior of two or more persons." L. Crombach, Essentials of Personnel Testing 21 (2d ed. 1960). The assumption underlying the use of such tests is that all individuals vary along "trait dimensions" which are measurable characteristics of individuals, and that such variation "is related to variation along a job performance dimension." R. Guion, Personnel Testing 8 (1965). A test is useful to an employer if individuals performing relatively better on the test generally perform relatively better on the job. The predictive value of the test lies in its usefulness in screening numbers of potential employees; such tests are necessarily fallible in predicting success of individual applicants. See, e.g., E. McCormick and J. Tiffin, Industrial Psychology 98 (6th ed. 1974).

In a broad sense, the extent to which a test is capable of predicting the success

of employees on a job is its "validity". Id. at 101. However, lawyers and laymen often confuse the concept of "validity" with a formal "validation study". For example, a statistical validation study is the written report of an experimental evaluation of the validity of a test, conducted by an industrial psychologist pursuant to certain scientific principles. Although experimentalists in the field of test validation uniformly stress the desirability for such formal evaluation,[2] a "valid" test may or may not have been "validated". Further, a test which was once "validated" may or may not continue to be "valid" for a particular job if there have been shifts in such variables as the nature of applicant population. See R. Guion, Personnel Testing, supra, at 21.

The associated concept of "reliability" is also important to the consideration of the instant case. Generally, industrial psychologists say that a test score is "reliable" if test administrators "can

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[2] See, e.g., E. McCormick and J. Tiffin, Industrial Psychology, supra, at 102.

reasonably expect that the score [individual applicants] got today is about the same as the score [they] would get a week from today, or that the score [individual applicants] got on one form of a test is nearly equivalent to the score [they] obtained on another form of the same test." M. Mandell, The Selection Process 288 (1964).

To ensure consistency in testing, or "reliability", industrial psychologists insist on the standardization of testing conditions. Instructions are given relating to the consistency of the testing area (i.e., ventilation, lighting, desk space, and audibility of instructions), the state of the individual being tested (i.e., temporal proximity to major life changes, such as army induction; illness; and fatigue), and the standardization of the directions given to the test subjects. See, generally, L. Crombach, Essentials of Personnel Testing, supra, at 43-46. If individuals having more favorable test conditions are competing with other test subjects having relatively less favorable conditions, the results of those tests may be neither "reliable" nor "valid".

The security of test material is also "of vital importance to the reliability and validity of test results." C. Lawshe and M. Balma, Principles of Personnel Testing 66 (2d ed. 1966). For that reason industrial psychologists advise that access to test materials should be controlled, and kept in locked cabinets when not in use. Id. See, also, R. Thorndike, Personnel Selection 268-70 (1949). The need for such careful control of test contents is obvious: If an individual taking a test has had any exposure to all or a portion of the test materials, his ability will not be fully tested by that administration of the test. Thus, one cannot expect a disclosed test to have predictive value, nor can one expect that individual's results to be similar to the results which might have been obtained by utilizing another form of the same test.

B. The Disclosure of the Contents of Personnel Tests will Impede or Prevent the Formal Process of Test "Validation" by the Experimental Method.

In addition to reducing the validity and reliability of personnel tests, the disclosure of test materials will also have a

serious impact upon an employer's ability to conduct formal validation studies. Statistical or "criterion-related" studies[3/] generally are based upon the statistical theory that "the investigator must reach

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3/ Although this Court has recognized that "there is no single method for appropriately validating employment tests for their relationship to job performance" (Washington v. Davis, 426 U.S. 229, 247 n. 13 (1976)), the employer before the Court had apparently relied upon the criterion-related validation method in the formal validation studies of the test at issue here. It should be noted that experimentalists have suggested other quite rigorous standards for the formal evaluation of personnel tests by the "content" method. See American Psychological Association, Standards for Educational & Psychological Tests at E12 (revised ed. 1974) (hereinafter, "APA Standards") and the Equal Employment Opportunity Commision's "Guidelines on Employee Selection Procedures", 29 C.F.R. § 1607.5(a) (hereinafter, "EEOC Guidelines").

Similarly, rather than permitting an employer to simply present testimony of the critical tasks in a specific job, certain experimentalists apparently would have this Court require a formal "job analysis" for every job subject to an employment discrimination charge based upon the use of a personnel test. See APA Standards at E3.1, and the EEOC Guidelines at 29 C.F.R. §§ 1607.4(c) & 1607.5(b)(3).

conclusions entirely on the basis of the data in the present investigation." See L. Crombach and G. Gleser, Psychological Tests and Personnel Decisions 153 (2d ed. 1965). Thus, in conducting such "validation", the industrial psychologist will formulate a "hypothesis" that there is a relationship between the test (or predictor) and the measure of job performance (or "criterion"). See R. Guion, Personnel Testing, supra, at 23. If a "criterion-related" validation study fails to demonstrate evidence of validity, the results of that study do not mean that the test is not adequately predicting performance for the employer. Rather, a negative result in a study may mean only that the investigator failed to utilize a proper hypothesis, and that the test is not necessarily related to the selected "criterion". Id. Alternatively, a failure to demonstrate validity in a formal study may be a result of a lack of "statistical power" resulting from having too few persons included in the study. See Schmidt, Hunter & Urry, "Statistical Power in Criterion-Related Validation Studies", 61 Journal of Applied Psychology 473 (1976).

The experimental method mandates that certain conditions must be controlled by the researcher. For example, the industrial psychologist conducting a statistical validation study must keep "variables not a part of the hypothesis from influencing the results of the experiment." 4/ R. Guion, Personnel Testing, supra, at 24. Knowledge of test content by individual test subjects would be a "contaminating influence", and would have a detrimental impact on a formal investigation of test validity by a statistical validation experiment. Therefore, the disclosure of test materials will

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4/ The Government, in its "Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae" (filed April 1975) in Albemarle Paper Co. v. Moody (U.S. Supreme Court Nos. 74-389 & 74-428) at 44, recognized that experimental technique in criticizing Albemarle's failure to ensure that the performance evaluators who were recording the "criterion" (for its validation study) were unaware of the test performance of the evaluated employees. In that brief, the Government noted that "The EEOC Guidelines . . . , like the APA Standards . . . , deem it essential that tests be administered under controlled and standarized conditions . . . . " Id.

proscribe the use of statistical validation studies as evidence of test validity.

C. A Balance of the Interests of the Employer and the Union in Test Confidentiality Mandates That Such Tests be Disclosed Only to a Professional Psychologist.

The Amici submit that the direct or potential disclosure of any personnel tests to individuals who may be test subjects is directly contrary to the business interests of an employer utilizing those tests. Both the reliability and the validity of such tests would be impaired to the extent that test subjects become aware of all or part of the contents of those test materials. Further, future formal validation studies will be impaired or made impossible due to the loss of control over the experimental conditions which must surround statistical validation efforts.

In the instant case, the employer apparently has incurred great expense in conducting formal statistical validation studies. See Respondent's Exhibits Nos. 13 & 14, reprinted in Appendix at 343 & 354. Because of the loss of validity and

reliability which will arise from test disclosure, the employer's investment in the experimental designs which resulted in those formal studies may be wasted.

In contrast, the union's interest in obtaining test materials is speculative at best. As the lower court recognized,

> It is possible that the union will not be able to make any determinations about the fairness of the tests by itself and that it will need the advice of a psychologist. . . . This may be a case where it would have been better if the union and Detroit Edison had been able to agree upon a neutral party to receive the documents . . . . [NLRB v. Detroit Edison Co., 560 F.2d 722, 726 (6th Cir. 1977).]

In the instant case, information pertaining to the predictive value of the tests was contained in the formal validation studies, and the disclosure of those studies by the employer accommodated the union's legitimate interest in ensuring test validity. Therefore, the Amici respectfully suggest that any balancing of interests regarding test disclosure should have resulted in the maintenance of the confidentiality of test materials.

II

THE COURT'S HOLDING THAT THE EMPLOYER'S PERSONNEL TESTS SHOULD REMAIN CONFIDENTIAL SHOULD NOT BE BASED UPON DEFERENCE TO VARIOUS FEDERAL COMPLIANCE AGENCY "GUIDELINES"

Because of the role of the Amici as merit system employers, and as employers which have been engaged in litigation concerning allegations of discrimination based upon the use of personnel tests, the Amici are as concerned with the rationale which the Court may utilize to uphold the confidentiality of test materials as they are about the issue of confidentiality itself. Those concerns are discussed in this part of the Brief.

A. A Decision Giving "Deference" to Guidelines Will Give Credibility to Policy Statements Known to be Professionally and Legally Falacious.

If a determination of the issue before the Court is based upon the language of Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures (29 C.F.R. § 1607 et seq.) (the "EEOC Guidelines"), this Court would enhance the credibility of administrative

standards which are known to be professionally unsound, and which were drafted in a legally questionable administrative action. Those guidelines, as well as other guidelines drafted by federal compliance agencies with litigation responsibilities, contain language which is calculated to lighten the Government's burden in the trial of an employment discrimination matter and to enhance its bargaining position in pretrial negotiations. The Amici ask the Court to decline from "deferring" to any such guidelines in this case in light of the following considerations.

1. The EEOC Guidelines erroneously imply that the process of formal "validation" is the only way to demonstrate job-relatedness. See EEOC Guidelines at 29 C.F.R. §§ 1607.2 - 1607.5. In fact, there are circumstances in which it is not feasible or not appropriate to utilize a formal validation technique. Federal Executive Agency "Employee Selection

Guidelines"[5] at § 3b, 41 Fed. Reg. 51736, 51744, 51752 (hereinafter, the "FEA Guidelines"). Further, the EEOC Guidelines apparently require experimental designs which are technically impossible. See Henderson v. First Nat'l Bank of Montgomery, 360 F.Supp. 531, 545 (M.D. Ala. 1973); Note, "Developments in the Law--Employment Discrimination and Title VII of the Civil Rights Act of 1964", 84 Harv. L.R. 1109, 1126-31 (March 1971).[6]

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[5] Those guidelines were published by the Department of Justice, Department of Labor, and the Civil Service Commission as members of the Equal Employment Opportunity Coordinating Council. See Title VII of the 1964 Civil Rights Act, as amended, at § 715, 42 USC § 2000e-14.

[6] See, also, "Brief of the Executive Committee of the Division of Industrial-Organizational Psychology of the American Psychological Association", in Washington v. Davis (Supreme Court No. 74-1492) wherein the EEOC's late William H. Enneis is recorded as testifying that of the three or four studies which he believed to have been conducted in compliance with the EEOC Guidelines, one cost approximately $400,000. Id. at A-33 to A-35. Mr. Enneis did not know the cost of the other studies. Id.

2. Both the EEOC Guidelines and other federal guidelines contain outdated professional standards. For example, the EEOC Guidelines contain provisions requiring that a validation experiment contain the erroneous concepts of "differential validity" and test "fairness". See EEOC Guidelines at 29 C.F.R. § 1607.5(b)(5) and the "Brief of American Society for Personnel Administration as Amicus Curiae" (filed on or about November 20, 1975) in Washington v. Davis (Supreme Court No. 74-1492) at 11-13. Even the newer FEA Guidelines wrongly imply that a sample size of 30 persons is adequate for a statistical validation study. Compare FEA Guidelines § 12b(1), 41 Fed. Reg. 51738, 51747, 51755, with Schmidt, Hunter & Urry, "Statistical Power in Criterion-Related Validation Studies", 61 Journal of Applied Psychology 473 (1976).

3. The EEOC Guidelines are widely recognized as having been promulgated as a negotiating tool, contrary to Congressional intent. This Court has previously recognized that "The EEOC Guidelines are not 'administrative regulations' promulgated pursuant to formal procedures established by the

Congress." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). Further, the EEOC Guidelines were adopted in the face of legislative history which demonstrated that the EEOC was not to have power generally attributed to quasi-legislative or quasi-judicial agencies (110 Cong. Rec. 2715 (1964)), and specific legislation granting the EEOC only the authority to promulgate procedural regulations. Title VII of the 1964 Civil Rights Act § 713, 42 USC § 2000e-12a. In fact, the EEOC Guidelines were originally developed to give that agency negotiating leverage in reaching conciliation agreements with employers using personnel tests. A. Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination", 71 Mich. L.R. 59, 59-60 (November 1972). See, generally, A. Blumrosen, "Administrative Creativity: The First Year of the Equal Employment Opportunity Commission" 38 Geo. Wash. L.R. 695 (May 1970).

It is not surprising that the attempt by various federal agencies to create legal interpretations of a developing

professional field has resulted in standards which are not responsive to scientific advances or to the needs of employers. While such standards would be difficult to follow merely because of the great diversity of personnel tests, that task becomes impossible when those standards are technically and dogmatically interpreted by courts and compliance agencies.7/

Such guidelines, when strictly interpreted simply cannot be responsive to innovations or advances in the disciplines associated with personnel testing. For example, as Amici stated on

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7/ For an example of an improper technical use of guidelines, compare APA standards at 8 (which cautions that those professional standards are "not written as law", but "are statements of ideals or goals") with League of Latin American Citizens v. City of Santa Ana, 410 F.Supp. 873, 903-906 (C.D. Cal. 1976) (in which the Honorable Warren J. Ferguson, District Judge, found the use of a "validated" written test to be violative of Title VII on the basis of noncompliance with certain guidelines and professional standards).

p. 13-14, supra, the experimentalists' approach to "validation" is based on a single statistical theory. However, a number of statistical theorists have begun to advocate "Bayesian statistics", which extends the classical statistical model to encompass other steps in the investigator's reasoning. See L. Crombach and G. Gleser, Psychological Tests and Personnel Decisions, supra, at 153-55. Because that new approach calls for the investigator to look beyond his or her own study for evidence of test validity, it is more in accord with traditional legal analysis than is the standard experimentalist approach. Cf. Rules 401 & 402, Federal Rules of Evidence. Further, the Bayesian approach is becoming increasingly credible for the analysis of personnel tests. See Schmidt & Hunter, "Development of a General Solution to the Problem of Validity Generalization", 62 Journal of Applied Psychology 529, 530-31 (1977). However, the innovative Bayesian approach will surely fail to satisfy the proponents of a strict interpretation of various "guidelines".

The Amici urge the Court to be conscious of the risks which arise when professional standards in the developing field are characterized by litigating agencies, one of which is the inability of guidelines to accommodate changes in the state of the art. However, the more serious risk to the thrust of Title VII, the risk of the abandonment of objective standards of employment in favor of quotas based upon population parity, is discussed in the following subsection of the brief.

B. Further "Deference" to Federal Compliance Agency Guidelines Will Result in the Use of Those Guidelines to Attain Population Parity in Employment.

The Amici have observed that "deference" to the "guidelines" of federal compliance agencies leads to a technical interpretation of those guidelines in an attempt to enforce an administrative policy of numerical population parity with general population statistics in employment decisions. Such beaucratic pressure and the resulting movement of employers toward the use of numerical quotas, has been foreseen by members of this Court.

Specifically, the prediction of Mr. Justice Blackmun, concurring in Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975), has come to fruition. In that opinion, Mr. Justice Blackmun stated,

> I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. [Id.]

During the following year, Mr. David Rose, the Justice Department's staff representative to the Equal Employment Opportunity Coordinating Council, wrote a "Memorandum for the Deputy Attorney General, Re: Selection Guidelines" (April 12, 1976). That memorandum pertained to the failure of the Council to agree on uniform guidelines, pursuant to its congressional mandate. Mr. Rose, in explaining the EEOC's possible motive in failing to reach agreement on such guidelines, stated that

> the thrust of the present guidelines is to place almost all test users in a posture of noncompliance; to give great discretion to enforcement personnel to determine who

> should be prosecuted; and to set aside objective selection procedures in favor of numerical hiring. [Id. at p. 5. That memorandum has been published in the Bureau of National Affairs' Daily Labor Report, No. 121, pp. AA-2 et seq. (June 22, 1976).]

Thus, the Amici submit that the effect of the EEOC Guidelines has been to administratively implement the concept of racial parity in employment through the use of quotas. "This, of course, is far from the intent of Title VII." Albemarle Paper Co. v. Moody, 422 U.S. 402, 449 (Blackmun, J., concurring).

To illustrate the problem confronting municipal employers attempting to effectuate merit principles through personnel testing, the Amici respectfully ask the Court to consider the experience of the City of Los Angeles as a case study. In its Complaint charging employment discrimination in the Los Angeles Police Department, the Government has alleged, inter alia, that Los Angeles has implemented a policy of discrimination

> by utilizing written entry level examinations and other qualifications and selection standards [having adverse impact] . . . in spite of the fact that such qualifications, tests, and selection standards have not been shown to be required by business necessity, and have not been properly validated as being predictive of successful job performance. ["Original Complaint" (filed June 2, 1977) in U.S. v. City of Los Angeles (U.S. District Court, Central District of California, Civil Action No. 77-1986 JWC) at ¶ 11c.]

Thus, in the experience of the Amici, the focus of compliance activity has become technical compliance with the experimental process of "validation", rather than an evidentiary evaluation of the job-relatedness of selection requirements.

As noted above, the motive behind that focus appears to be the administrative desire to enforce the objective of numerical parity in employment. As the Assistant Attorney General, Civil Rights Division, stated shortly following the filing of the Government's Complaint against Los Angeles,

> Our suit against the Los Angeles police department was based in part on a referral from LEAA after it had failed to meet grant requirements to increase minority and female percentages. [U.S. Dept. of Justice, Remarks of Drew S. Days, III . . . before the National Black Policemen's Association . . . on August 25, 1977 at p.6.]

Compare Omnibus Crime Control and Safe Streets Act of 1968 § 518(b), 42 U.S.C. § 3766(b).

The Los Angeles experience is not unique among employers. As the result of similar experiences, this Court is beginning to see the impact of the administrative pressures brought to bear against employers in an attempt to enforce the use of racial parity in employment. See, e.g., Waters v. Furnco Construction Corp., 551 F.2d 1085 (7th Cir. 1977) (U.S. Supreme Court No. 77-369); Weber v. Kaiser Aluminum & Chemical Corp. 563 F.2d 216 (5th Cir. 1977). Those pressures have become so pervasive that one academician has opined, "That all this is still called 'equal employment opportunity' is simply another example of the misnaming of reality in an age in which words are easily distorted into their

opposites." N. Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy 49 (1975).

From the prospective of the Amici, this Court's adoption or endorsement of provisions of any federal "guidelines" or professional "standards" will result in increased administrative pressure on municipal employers to achieve numerical parity with general population statistics in employment. Therefore, the Amici submit that any "deference" granted to such standards in the context of this case will undercut the "unambiguous" focus of Title VII: That persons must be treated as "individuals", rather than "as simply components of a racial, religious, sexual, or national class." City of Los Angeles, Dept. of Water and Power v. Manhart, ____ U.S. ____, 98 S.Ct. 1370, 1375 (1978).

C. A Positive Solution to the Problem of Test Confidentiality: Recognition of the Need for Tests to Remain Confidential Because of the Potential Impact of Test Disclosure Upon Test Validity and Reliability.

The Amici neither ask nor expect the Court to make positive statements regarding the legal effect of various federal guidelines, or the abuse of those guidelines by federal compliance agencies. Rather, those municipal employers request the Court to avoid language in an opinion upholding the Employer which could be interpreted to be supportive of federal guidelines.

Therefore, the Amici urge this Court to uphold the confidentiality of test material by holding that test disclosure would result in making a test useless as a predictor of job performance. In so holding, the Amici ask that any mention of the concept of "job-relatedness" be consistent with "the much more sensible construction of the job-relatedness requirement" interpreted in Washington v. Davis, 426 U.S. at 251.

Further, if various federal compliance agency guidelines are discussed at all, the Amici request that such discussion parallel the language of General Electric Co. v. Gilbert, ____ U.S. ____, 97 S.Ct. 401, 411 (1976), in which the Court found that the EEOC Guidelines were entitled to "consideration in determining legislative intent . . . ."

III

IN THE EVENT THIS COURT SHOULD UPHOLD THE LOWER COURT DECISION, THE AMICI ASK THAT COURTS REVIEWING SIMILAR MATTERS IN THE FUTURE BE CAUTIONED THAT THE BALANCING OF EMPLOYER AND UNION INTERESTS SHOULD BE ON A CASE-BY-CASE BASIS

In the event that this Court decided to uphold the lower court decision, the Amici ask the Court to recognize that a "balancing of interests" in a test disclosure case may require a different decision depending upon such factors as the potential costs of employee error and training, and an employer's need to objectively distinguish between large numbers of applicants.

For cities, personnel testing grew directly from the implementation of merit systems to avoid the granting of jobs and compensation as "spoils" of a political victory. Prior to the implementation of such merit systems "[p]ositions were created at public expense to serve as rewards for party workers, and salaries were often adjusted not to the value of the public services performed but to the value of the employee's party service." W. Anderson & E. Weidner, American City Government 504 (Revised ed. 1950).

Like the civil rights movement, merit systems did not come into vogue overnight. In fact, the movement toward a federal merit system began only after the death of President Garfield at the hands of a disappointed officeseeker in the late 19th Century. See M. Schinagl, History of Efficiency Ratings in the Federal Government 18 (1966). Gradually, the concept of appointing individuals to public office on the basis of merit principles moved through the federal level, and was implemented by local governments. By 1949, merit systems were in general use in larger

cities. See W. Anderson & E. Weidner, American City Government, supra, at 505. Although we now tend to take little notice of the charter provisions providing for merit appointments in the context of other litigation, such laws are essential to the fair and effective administration of city government. Civil service laws, like the laws protecting the rights of unions, "were enacted to ameliorate a social evil." Cf.Kirkland v. New York State Dept. of Correctional Services, 520 F.2d 420, 428 (2d Cir. 1975).

Therefore, the Amici urge that any decision upholding the lower court in this case be accompanied by a caveat that the decision reached need not have been the same given different policy considerations, such as an employer's need to administer personnel tests to uphold merit principles.

CONCLUSION

In Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971), this Court wrote that rather than "disparaging job qualifications", Congress in Title VII of the 1964 Civil Rights Act "has made such qualifications

the controlling factor, so that race, religion, nationality, and sex become irrelevant." The Amici submit that the use of objective, job-related personnel tests are an important tool in promoting the irrelevancy of those forbidden characteristics, and that the ultimate goal of Title VII will be furthered if this Court chooses to uphold the necessary confidentiality of personnel tests. These Amici also ask this Court to articulate that holding in a way which will not enable litigating administrative agencies the opportunity to utilize the strict interpretation of various guidelines to impede that goal.

Respectfully submitted,

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